

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: )  
 )  
Application of Certification for the East Altamont )  
Energy Center )

Docket No. 01-AFC-04

**SUPPLEMENT  
TO  
APPLICANT'S STATUS REPORT #5**

May 07, 2002

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The East Altamont Energy Center LLC ("Applicant") submitted its Status Report #5 on April 24, 2002. On May 1, 2002, the California Energy Commission Staff ("Staff") submitted its Status Report #5 to provide the Committee with an update on Staff's efforts to resolve outstanding issues associated with the East Altamont Energy Center (EAEC) project. The CEC Staff's Status Report (1) addresses the schedule for completion of this proceeding, and (2) identifies outstanding informational items, all of which the Staff believes must be received before it will publish the Final Staff Assessment (FSA).

In the interest of facilitating a full discussion of the Schedule and Staff's informational needs at the May 10 Scheduling Conference, the Applicant would like to take this opportunity to comment upon the scheduling issues raised in the Staff's Status Report #5.

The Staff's Status Report #5 also describes the tentative conclusions and recommendations of the Staff's ongoing analysis in a number of subject areas. The Applicant does not agree with Staff's characterization of the state of the evidence in some of these subject areas. At the Scheduling Conference, the Applicant will be prepared to discuss all aspects of the project identified in the Committee's Second Revised Scheduling Order.

**Schedule**

The Staff proposes to issue the Final Staff Assessment ("FSA") as a single document 62 days *or more* after receipt of "all critical items." The Staff deems the Final Determination of Compliance ("FDOC") as one of these critical items. Assuming the FDOC is filed in late May, Staff is proposing to issue the FSA as a single document no earlier than August 1, more than eight months after the Preliminary Staff Assessment was issued, and more than twelve months after the EAEC Application for Certification ("AFC") was deemed data adequate. If the FSA is not issued until August, it would be difficult for the Commission to issue a Final

Decision before November. A Final Decision by the Commission as late as November will preclude the project coming on line in the summer of 2005.

By any measure, an interval of 62 days between issuance of the FDOC and issuance of the FSA is excessive and unreasonable. As Shown in Table 1, the 62 day interval proposed by Staff exceeds the time authorized by the Committee's original scheduling order and substantially exceeds the time required in recent, similar AFC proceedings.

**TABLE 1**

<b>Project/Schedule</b>	<b>Interval between filing of FDOC and issuance of FSA</b>
Sutter (bifurcated schedule & joint FSA/EIS)	7 days
Delta (bifurcated schedule)	15 days
Blythe <sup>1</sup> (joint FSA/EA)	19 days
EAEC - Original Committee Scheduling Order, August 24, 2001	38 days <sup>2</sup>
EAEC - Staff's Current Proposal	62 days

Under the Commission's power plant permitting timeline, the Commission typically expects that the FSA will be issued within 20 to 40 days after the FDOC is filed, assuming that the FDOC is issued in a timely manner by the Air District. (Energy Facility Licensing Process - Developers Guide of Practices & Procedures, November 2000, p. 7.) However, in instances where there has been a delay in issuance of the FDOC, the Commission has often bifurcated the FSA, resulting in the issuance of the FSA in a shorter interval between filing of the FDOC and issuance of the FSA.

The Staff claims that "[b]ifurcation is not consistent with Western's requirements for issuing a document pursuant to NEPA." (Staff Status Report #5, p.2) However, in the Sutter Power Plant Project (87-AFC-2), the Staff and Western Area Power Administration jointly issued the Final Staff Assessment/Draft Environmental Impact Statement *prior* to the release of the FDOC, on October 19, 1998. The Air District filed the FDOC on November 10, 1998, and the CEC Staff and Western released an update to the Air Quality section of the FSA/EIS on November 17, during the evidentiary hearings. A final hearing on Air Quality issues was held on December 1, and the evidentiary record was closed just 21 days after issuance of the FDOC. Given the fact that the Staff and Western were able to bifurcate preparation of the FSA/EIS in the Sutter Case, there is no practical or legal reason why the Committee could not establish a similar timetable in this proceeding for two-part publication of the FSA/EA.

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<sup>1</sup> In the Blythe Power Plant proceeding, the CEC Staff and Western also issued a joint FSA/EA. In that case, the FSA/EA was not bifurcated; nevertheless, the FSA/EA was issued promptly after filing of the FDOC. The FDOC was filed on October 25, 2000 and the FSA/EA was issued on November 13, 2000, just 19 days thereafter. The Applicant respectfully submits that the Staff has made no showing why a similar schedule is infeasible in the instant proceeding.

<sup>2</sup> The Committee Scheduling Order of August 24, 2001, anticipated the FDOC would be filed in mid-December and the FSA would be issued on January 23, 2002, an interval of approximately 38 days.

In the Delta Power Plant Proceeding, issuance of the FDOC was similarly bifurcated. Part 1 of the FSA for all subjects except Air Quality and Soil/Water was issued on September 20, 1999. Evidentiary hearings on Part 1 were held between October 5 and November 3. The FDOC was filed on October 25. Part 2 of the FSA (on Air Quality and Soil/Water) was issued fifteen days later on November 9. An evidentiary hearing was held on Part 2 of the FSA on November 18 and the evidentiary record was closed, just 24 days after issuance of the FDOC.

In its Status Report #5, Staff states that it “does not see how a bifurcation of the final document would in any way expedite the overall schedule.” We believe that the benefits are self evident. Bifurcation of the FSA in the Sutter and Delta cases clearly expedited the schedule in each proceeding. By bifurcating the schedule, the Staff was able to draft, review, edit, format and publish 90% of the final document without waiting for the FDOC to be filed. Thereafter, when the FDOC was released, it was a simple and quick matter to update the Air Quality section and release it as a supplement. This procedure also allowed the Committee to hold hearings on the bulk of the AFC before the FDOC was issued, which resulted in closing the evidentiary record within 21-24 days of the filing of the FDOC.

The California Auditor General has clearly recognized how bifurcation will expedite the overall schedule. In a recent review of the Commission siting process, the Auditor General stated:

“To its credit, the energy commission did not wait for resolution of all issues before moving forward with the processing of applications. For example, it was able to issue its final decisions in less than 12 months for eight applications despite the fact that it did not receive decisions from the government agencies involved until 218 to 330 days after the applications had been deemed complete. Moreover, even though the local air district for the La Paloma Generating Project did not issue its final decision until 392 days after the application had been deemed adequate, the energy commission was able to issue its final decision only 14 days later.

“For the eight cases just mentioned, the energy commission developed *Final Staff Assessments*, held hearings and public workshops, and worked to resolve all outstanding issues with the exception of air quality while waiting for the final decisions to be issued by the local air districts. As a result, once the local air districts made their decisions, the energy commission was able to complete the application process quickly and meet the 12-month standard.” California State Auditor's Report on Energy Commission Siting Process, August 20, 2001, pp. 23-24.

In the instant case, the Staff acknowledges that it has all of the information it needs to complete the FSA in most subject areas. As the Auditor General has recognized, there is simply no need for the Staff or the Commission to await the resolution of *all* issues before moving forward now to issue the Final Staff Assessment, hold hearings and work to resolve all outstanding issues that are ready for resolution. Past Commission practice in eight different proceedings, including at least one proceeding involving a joint FSA/EIS, demonstrates the wisdom and necessity of a bifurcated schedule in this proceeding in order to “complete the application process quickly and meet the 12-month standard.” *Id* at p. 24.

The Commission has a legal duty to complete the AFC within 12 months. We are sure that the Commission takes this legal duty very seriously. The Applicant respectfully urges the Committee to honor the Commission's statutory obligation to process the Application in a timely manner by adopting the following schedule:

PDOC –	April 12
FDOC -	May 28
FSA -	May 24 <sup>3</sup> , Supplement - June 3
Prehearing Conference	June 7
Evidentiary hearings	June 17-21
Proposed Decision	July 26
Final Decision	August 28

### **STAFF'S SPECIFIC INFORMATIONAL NEEDS**

The Staff has identified five items that it states are critical to its final analysis and without which its final analysis would be incomplete. These items are:

- The FDOC,
- Designation by applicant of specific land parcels to be purchased for mitigation,
- Assurance from USFWS and CDFG that all biological mitigation proposed by applicant is acceptable,<sup>4</sup>
- "Letter of Agreement" between SMUD and the applicant,
- Photo-simulation of "reasonable worst case plume".

The Applicant believes that the (1) FDOC, (2) a biological mitigation impact proposal and (3) assurances from USFWS and CDFG regarding the mitigation proposal are items that are necessary to complete the *Commission's* Final Decision. However, there is no legal requirement that these items must be received prior to the issuance of the FSA. The Applicant expects that the FDOC, the biological mitigation proposal and the findings of the USFWS and CDFG will be received in this proceeding before the close of the evidentiary hearings, at which

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<sup>3</sup> In the Applicant's recently filed Status Report #5, we had proposed that the FSA be issued on May 7, 2002. However, due to the delay in setting a Scheduling Conference following issuance of the PDOC on April 12, a May 7 deadline is obviously not practicable. On the other hand, a May 28 date for issuance of the FSA on most issues is feasible, if Staff devotes the same effort to timely publication as it has in the Sutter, Delta, Blythe and numerous other proceedings.

<sup>4</sup> The Staff states that "a letter from USFWS is needed, indicating that the Biological Assessment is complete and the mitigation measures are acceptable." Staff Status Update #5, p. 4. In an April 5 meeting with the USFWS, in which the Commission Staff was present, the USFWS representative stated that the USFWS does not typically provide letters stating that a Biological Assessment is complete. To the Applicant's knowledge, such a letter has not been required on past Commission proceedings. Nor has the Commission previously required a letter from the USFWS, prior to issuance of the Biological Opinion, stating that the mitigation measures proposed by the Applicant are acceptable. The Commission should accept, as it has in past proceedings, the verbal assurance from the USFWS and CDFG regarding the adequacy of the proposed mitigation.

time the staff may supplement the FSA, if it desires to do so. While it is certainly desirable to receive these items before the close of the evidentiary record, the Committee has the discretion to reopen the record and receive these items at any time prior to issuance of the Final Decision. In the La Paloma case, for example, the Commission received the FDOC just 14 days prior to the issuance of the Final Decision.

### **The Letter Agreement**

As to the Staff's alleged need for additional information concerning transmission system engineering, the Staff has sought written assurances from "the affected transmission owners that transmission system impacts have been adequately mitigated" and each of the transmission owners has provided such written assurances. In a letter dated April 11, 2002, SMUD confirmed that impacts to the SMUD "electrical system have been adequately addressed."

However, Staff says that it is not satisfied with such written assurances from SMUD, and now seeks a more detailed justification from SMUD to support SMUD's assessment that impacts to its transmission system have been adequately addressed by SMUD.

There are three problems with Staff's request for additional information probing SMUD's assessment.

First, the request is untimely. As Staff concedes, the request relates to information that was presented in the DFIS that Staff received in early December 2001. Staff had ample opportunity to discuss these issues with SMUD and the Applicant in the workshop on December 20, 2001 and did not do so. For the Staff to raise these issues now, more than nine months days into this AFC proceeding, is inexcusably dilatory.

Second, the issues that the Staff seeks to examine are outside the jurisdiction of the Commission. As we explain in our Notice of Objections to Data Request Set 6, the Staff's inquiry into details of congestion management plans beyond the first point of interconnection fails to respect the distinction between (1) safe and reliable interconnection, which is clearly a CEC jurisdiction issue, and (2) congestion management, which is a federally-regulated, operational issue. Rather than repeat these arguments here, we incorporate by reference our Notice of Objections to Data Request Set 6.

Third, even if these matters were within the jurisdiction of the Commission, the Staff should defer to the determination of SMUD because it is the responsible local agency. As the Staff correctly explained in the PSA, the Staff does not defer to a local agency only if 1) the local agency's LORS interpretation would put the Commission's license in jeopardy; or 2) the local LORS interpretation would lead to the Commission's decision having a factual error. Since deferring to SMUD's determination would not trigger either of these circumstances, this is a clear instance in which the Staff should defer to SMUD's determination that all impacts have been adequately addressed.

Notwithstanding the Applicant's strong objection to Staff's untimely request, the Applicant has even a stronger interest in a timely resolution of the transmission and engineering issues. Therefore, without waiving our objections to the Staff's receipt of this information, on or before May 15, 2002 we will provide Staff with a copy of the Letter Agreement between the Applicant and SMUD. We reserve our right to renew our objection should Staff continue to pursue these issues in a dilatory manner.

### **The Plume Analysis**

As to the visual plume analysis, the preparation of a photo-simulation of "reasonable worst case plume" should not be a necessary precondition to issuance of the Final Staff Assessment.

First, Staff is still evaluating the potential impact of plumes, therefore Staff is not able to conclude at this time whether the visual impact will be significant or insignificant. If the impacts are insignificant, there is need at all for a visual simulation.

Second, even if Staff concludes that the impact is significant, Staff has failed to demonstrate that a two-dimensional "snap-shot" depiction of a transitory three-dimensional condition would have any evidentiary value. Given the wide variability in the opacity of any plume, changing wind conditions and the infinite possibilities of background sky (low clouds, high clouds, haze, position of sun), there is no established methodology for preparation of such a simulation.

Finally, the request for a photo-simulation will cause undue delay in the proceeding. The Staff has a legal duty to do the best analysis it can within the timeframe permitted by the Statute. If the item was critical, Staff should have submitted an appropriate data request promptly after it received the revised plume modeling information.

### **Other Data Responses**

Attachment A sets forth a list of all information docketed by the Applicant since the last Scheduling Conference on January 3, 2002.

Respectfully submitted,

Dated: May 8, 2002

ELLISON, SCHNEIDER & HARRIS L.L.P.

By \_\_\_\_\_  
Greggory L. Wheatland, Esq.

Attorney for East Altamont Energy Center LLP

## ATTACHMENT A

### Information Docketed for the East Altamont Energy Center Application for Certification

<b>Docket Log Number</b>	<b>Date Filed</b>	<b>To</b>	<b>From</b>	<b>Subject</b>
24087	01/14/2002	CEC/Davis/Dockets	CH2MHill/Salamy	PSA Comments Set #1
24173	01/16/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Water Resources Data Request Response Set # 4 - POS
24241	01/18/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Informal Data Request Response Set # 6 - Transmission System Engineering - POS
24419	02/06/2002	CEC/Davis/Dockets	CH2MHILL/Salamy	Supplemental C POS
24458	02/11/2002	CEC/Davis/Dockets	CH2MHILL/Salamy	Data Request Response Set 2 J - POS
24633	02/22/2002	CEC/Davis/Dockets	CH2MHILL/Salamy	Revised Document cover for Data Request Response Set #2
24696	02/22/2002	CEC/Davis/Dockets	CH2MHILL/Salamy	Data Request Response Set 5A POS
24960	03/07/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Biological Assessment - POS
25131	04/03/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Data Request Response Set 5B - Cultural Resources Data Request 149, 150 and 151 - POS
25132	04/03/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Revised Visible Water Vapor Plume Analysis - Response to CEC Preliminary Staff Analysis - Assessment of the Visual Impact of the Plumes an
25133	04/03/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Response to Issues Raised at the 1/23/02 Visual and Biological Resources Workshop on the Conceptual Landscape Plan - POS
25134	04/03/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Response from the National Marine Fisheries Services - POS
Not Yet Issued	04/23/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Data Request Response Set #6
Not Yet Issued	04/23/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Letter from the Western Area Power Administration Regarding the Possibility of Modifying the Lighting Plan at the Tracy Substation
Not Yet Issued	04/26/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Data Request Response Set #7
Not Yet Issued	05/01/2002	CEC/Davis/Dockets	CH2MHill/Salamy	Preliminary Staff Assessment Comment Set #2